Grocery Haulers, Inc. *and* Local 707, International Brotherhood of Teamsters, AFL–CIO *and* Local 6, Amalgamated Industrial and Service Workers Union, Party to the Contract. Cases 29–CA–17356, 29–CA–17372, 29–CA–17407, and 29–CA–17458

January 13, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On July 29, 1994, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent and Teamsters Local 707 filed answering briefs. The General Counsel filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Grocery Haulers, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing and bargaining with Local 6, Amalgamated Industrial and Service Workers Union (Local 6), or any successor thereto, as the collective-bargaining representative of its employees, unless and until Local 6 is certified by the National Labor Relations Board as the exclusive representative of an appropriate unit of the Respondent's employees.

(b) Maintaining or giving any force or effect to its collective-bargaining agreement with Local 6, and to any modifications, extensions, supplements, or renewals thereof; or to any Local 6 deduction authorizations that have been executed by its employees; or to any other contract, agreement, or understanding entered into with Local 6, or any successor thereto, covering its employees with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment; provided, however, that nothing in this Order shall be construed to require the Respondent to vary or abandon any wage increase or other benefits, terms, and conditions of employment that it has established in performance of the agreement.

(c) Deducting union fees, dues, assessments, and other moneys from the wages of its employees on behalf of Local 6, and remitting the union fees, dues, assessments, and other moneys to Local 6, unless and until Local 6 is certified by the National Labor Relations Board as the exclusive bargaining representative of the Respondent's employees, and the employees thereafter execute uncoerced authorizations for the deduction of the union fees, dues, assessments, and other moneys from their wages pursuant to a valid collective-bargaining agreement.

(d) Rendering assistance and support to Local 6 by soliciting its employees to execute Local 6 membership and dues-checkoff cards.

(e) Rendering assistance and support to Local 6 by threatening its employees with discharge if they did not sign Local 6 membership and dues-checkoff cards.

(f) Interrogating its employees concerning their membership in, or activities on behalf of, Local 707, International Brotherhood of Teamsters, AFL–CIO (Local 707).

(g) Threatening its employees with discharge because of their membership in, or activities on behalf of, Local 707.

(h) Proceeding to arbitration seeking the discharge of Vincent Taliercio because of his membership in, or activities on behalf of, Local 707.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold recognition from Local 6, or any successor thereto, as the collective-bargaining representative of its employees, unless and until Local 6 is certified by the National Labor Relations Board as the exclusive representative of an appropriate unit of the Respondent's employees.

(b) Reimburse all of its present and former employees for any dues, initiation fees, assessments, and other moneys deducted from their wages on behalf of Local 6, together with interest thereon as provided in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

---

[1] No exceptions were filed to the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee Rory Scott.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In his Conclusions of Law 4 the judge inadvertently included a finding of a violation of Sec. 8(a)(5). We correct this error.

[3] As requested by the General Counsel in his exceptions, we have modified the judge's recommended Order and notice to conform to and remedy the violations found.

(c) Withdraw, in writing to Local 6, its arbitration proceedings seeking the discharge of Taliercio, and notify Taliercio in writing of such action.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of money due and payable to its employees under this Order.

(e) Post in conspicuous places at its Brooklyn, New York facility, and at all other locations where notices to employees are posted, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT recognize or bargain with Local 6, Amalgamated Industrial and Service Workers Union (Local 6), or any successor thereto, as the collective-bargaining representative of our employees, unless and until Local 6 is certified by the National Labor Relations Board as the exclusive representative of an appropriate unit of our employees.

WE WILL NOT maintain or give any force or effect to our collective-bargaining agreement with Local 6, and to any modifications, extensions, supplements, or renewals thereof; or to any Local 6 deduction authorizations that have been executed by our employees; or to any other contract, agreement, or understanding entered into with Local 6, or any successor thereto, covering our employees with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment, and WE WILL NOT seek to vary or abandon any wage increase or other benefits, terms, and conditions of employment that we have established in performance of the agreement.

WE WILL NOT deduct union fees, dues, assessments, and other moneys from the wages of our employees on behalf of Local 6, and cease and desist from remitting the union fees, dues, assessments, and other moneys to Local 6, unless and until Local 6 is certified by the National Labor Relations Board as the exclusive bargaining representative of our employees, and the employees thereafter execute uncoerced authorizations for the deduction of the union fees, dues, assessments, and other moneys from their wages pursuant to a valid collective-bargaining agreement.

WE WILL NOT render assistance and support to Local 6 by soliciting our employees to execute Local 6 membership and dues-checkoff cards.

WE WILL NOT render assistance and support to Local 6 by threatening our employees with discharge if they do not sign Local 6 membership and dues-checkoff cards.

WE WILL NOT interrogate our employees concerning their membership in, or activities on behalf of, Local 707, International Brotherhood of Teamsters, AFL–CIO (Local 707).

WE WILL NOT threaten our employees with discharge because of their membership in, or activities on behalf of, Local 707.

WE WILL NOT proceed to arbitration seeking the discharge of Vincent Taliercio because of his membership in, or activities on behalf of, Local 707.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withdraw and withhold recognition from Local 6, or any successor thereto, as the collective-bargaining representative of our employees, unless and until Local 6 is certified by the National Labor Relations Board as the exclusive representative of an appropriate unit of our employees.

WE WILL reimburse all of our present and former employees for any dues, initiation fees, assessments, and other moneys deducted from their wages on behalf of Local 6, together with interest thereon.

WE WILL withdraw, in writing to Local 6, our arbitration proceedings seeking the discharge of Taliercio, and notify Taliercio in writing of such action.

GROCERY HAULERS, INC.

Sharon Chau, Esq., for the General Counsel.
Sanford Pollack, Esq. (Horowitz & Pollack, P.C.), for the Respondent.
Joseph J. Vitale, Esq. (Cohen Weiss & Simon), for Charging Party Local 707.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on January 19, 20, and 24, 1993, in Brooklyn, New York.

Based upon unfair labor practice charges filed by Local 707, International Brotherhood of Teamsters, AFL–CIO (the Union) against Grocery Haulers, Inc. (Respondent), General Counsel caused a complaint to issue on October 14, 1993, alleging violations of Section 8(a)(1), (2), and (3) of the Act. The thrust of the complaint alleges that Respondent unlawfully recognized Local 6, Amalgamated, Industrial, and Service Workers Union (Local 6) and thereafter executed a collective-bargaining agreement with Local 6 containing union-security provisions, unlawfully discharged one employee, in violation of Section 8(a)(1) and (3), and engaged in various independent violations of Section 8(a)(1).

On the entire record, including my observations of the demeanor of the witnesses, and the briefs filed by counsel for the General Counsel, counsel for the Union, and counsel for Respondent, I make the following findings of fact and conclusions of law.

Respondent, is a New York corporation, with its office and principal place of business located in Edgewood, New York, and a facility located on 8925 Avenue D, Brooklyn, New York. Respondent is engaged in the business of delivering meat, grocery, and dairy products from various wholesalers to various supermarket chains, including Key Foods, located in the State of New York. Respondent annually receives in excess of $50,000 for the delivery of such products. Key Food annually purchases in excess of $50,000 worth of food products, which it receives directly from States other than the State of New York.

It is admitted and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find that the Union and Local 6 are labor organizations within the meaning of Section 2(5) of the Act.

Respondent corporation was formed in December 1992 when Mark Jacobson, Respondent president and an admitted supervisor within the meaning of Section 2(11) of the Act, was informed by Key Food that his bid to succeed R-Jo Trucking, who was at that time making all warehouse deliveries to various Key Food stores had been approved, and that he would begin making such deliveries in late January or early February 1993.

Sometime in December 1992, Respondent advertised for drivers. Applicants who responded to Respondent's ad were informed that a meeting would be held at a local Marriott Hotel in December 1992, and that a meeting would be held where they would be interviewed for employment. The meeting took place sometime in late December 1992. About 60 applicants were interviewed. After the interview, the applicants were told by Respondent officials to report to the Salem Truck Leasing facility for a road test on January 5, 1993. Salem is a corporation which leases trucks to Respondent.

On January 5, 1993, about 53 applicants arrived at the Salem facility, a large facility area, for their road tests. Officials of Respondent and Salem were present. During a several hour period, road tests were administered. About 50 employees passed the road test. They were paid a flat rate for taking the test, and were informed by Respondent officials that they were on a standby status, and would be contacted by Respondent as to when to report for work. In the meantime, R-Jo was performing the deliveries for Key on a day-to-day basis.

On or about January 8, Respondent was notified by Key that it would commence regular deliveries for Key on Monday, January 11. The 50 standby employees were notified by Respondent that they should report for work on the morning of January 11. According to the admission of Respondent's operation manager, James Stapleton, an admitted supervisor as defined in the Act, all the 50 odd employees who reported for work on January 11 filled out employment applications. These employees were not paid a salary until they began work on January 11.

Sometime on January 5, when the applicants were taking their road tests, Local 6 officials, Joseph Girlando and Armondo Ponce, who were apparently present at the Salem facility, signed up a number of applicants and on that same day notified Respondent President Jacobson that they represented a majority of Respondent's employees. There is no evidence as to whether the employees who signed the Local 6 petition proffered by Local 6 signed it before or after they were notified by Respondent that they were on a standby status. In any event, Respondent President Jacobson called his attorney, Sanford Pollack, who came down to Respondent's facility in the afternoon of January 5 and met with the Local 6 representatives and Jacobson. During the course of the meeting, one of the Local 6 officials showed Jacobson the petition and Jacobson compared the signatures on the petition with the signatures on Respondent's sign-in sheet. Jacobson told Pollack that it appeared that approximately 30 employees had signed the petition. Pollack then stated that Respondent had no alternative but to recognize Local 6 as the collective-bargaining representative for its drivers. A standard recognition agreement was immediately thereafter executed. On January 14, Respondent executed a collective-bargaining agreement with Local 6. The collective-bargaining agreement contained the usual union-security provisions including a checkoff clause, which provided that Respondent would, upon obtaining proper authorization from the employees, deduct Local 6 dues and remit such moneys to Local 6. There is no dispute that beginning on January 14, and thereafter Respondent deducted such dues from its employees pursuant to the contract's checkoff provisions.

On January 26, Respondent driver Vincent Taliercio was present at Respondent's dispatcher office with Respondent Operations Manager Stapleton. Stapleton handed Taliercio a Local 6 dues-checkoff card and asked him to sign it. Taliercio responded that he wanted to hold off before signing the card. Stapleton replied that: ''If you don't sign this, you're not going to work today.'' Taliercio then signed the dues-checkoff card.[1]

Sometime during the morning of January 26, employee Rory Scott was present at the dispatcher's office. Stapleton handed Scott a Local 6 membership card and a dues-checkoff card and told Scott to sign the cards. Scott replied that he did not want to. Stapleton responded that if Scott wanted to keep his job, it would be in his best interest to sign the cards. Scott signed both cards.[2]

Since January 26, Respondent has deducted Local 6 dues from Taliercio and Scott.

During the months of April and May employee Scott and other unit employees became disenchanted with Local 6 representation and attended several union meetings. During this period, Scott attended three such meetings. Sometime after Scott attended his second meeting Stapleton came over to him and asked him what was going on with the Union, and who had attended the second meeting attended by Scott.[3] Stapleton then told Scott that if he continued his involvement with the Union his job might be at stake.

Taliercio had originally been appointed to the position of Local 6 shop steward. However, by April he had become disenchanted with Local 6 and had become active on behalf of the Union. Sometime in early May Stapleton had approached him by the dispatcher's office and told him the Union would never get in and if he continued with his activity and support for the Union he might not have a job.

On May 12, one of Respondent's dispatchers told employee Scott that Jacobson wanted to see him. Scott then went to Jacobson's office. Jacobson showed Scott a picture of a wooden stockade fence with about two-and-a-half sections flattened, leaving a gaping hole in the fence about the width of a tractor trailer (G.C. Exh. 10). Jacobson told Scott that he had received a call from a dispatcher at one of the Key Food stores on Scott's route that Scott had knocked over a section of fence with the rear of his trailer. Scott responded that he was unaware of such accident. The Key Food employee who witnessed the accident filed a written report of the accident indicating that Scott was the driver of the truck which backed into the fence, and that Scott drove off without stopping.[4] Therefore, based upon my unfavorable impression of Scott's credibility, I conclude that Scott was aware that he had had an accident and deliberately failed to report it. Jacobson then told Scott that he was suspended, pending arbitration, and probably would be fired. Although Respondent is a new corporation, formed for the execution of its contract with Key, it had an initial policy that employees may be terminated for failure to report an accident. It appears that Respondent was concerned about the failure to report, which bears on trustworthiness, rather than the accident itself. In this connection Scott had a trailer accident on April 30, which was reported and Respondent took no action.

A few days later Scott received a termination letter from Respondent. The letter set forth as a cause for discharge the unreported accident, described above, and an additional cause that Scott returned from a delivery to Key with 43 cases of juice and failed to advise Respondent dispatchers of such return as required, so that it could be stored in Respondent's refrigerator. Such failure to advise Respondent's dispatchers of the return resulted in a total spoilage of the juice.

Scott testified that on Friday, May 7, late in it afternoon, the Key manager at a store to which Scott was making a delivery refused to accept the delivery of 43 cases of juice, claiming it was too late in the day. Key then issued a claim number covering the refused delivery and gave this to Scott. Scott testified that he then notified Respondent's dispatcher, Joseph Olivo, and told him about the refused delivery and Olivo told him to return to Respondent's facility and where to park his trailer. Scott returned to Respondent's facility and parked his trailer, and delivered his routine papers to Olivo.

Olivo, during direct and cross-examination, repeatedly denied that Scott ever called him about the failure of Key to accept the delivery. Olivo testified that the usual policy in such cases is for the driver to return the unaccepted delivery to Respondent's warehouse, and inform the dispatcher on duty of the return so that appropriate measures by Respondent can be taken to store the food product. In this case appropriate measures would have been to the store the product in a refrigerator.

I do not credit Scotts testimony that he informed Olivo about the refused delivery of juice. I do credit Olivo's testimony that Scott never told him about the refused delivery, and that is the reason that Respondent did not remove the juice from Scott's trailer and that is also why the cases of juice spoiled. As set forth above, I was very unfavorably impressed with Scott's credibly. Scott's failure to report the refused delivery to his dispatcher, Olivo, is exactly consistent with his failure to report his accident at Key. Moreover, I was impressed with the credibility of Olivo. His testimony on both direct and cross-examination was detailed, decisive, and responsive. The manner in which he testified appeared to be objective. I was most impressed with his credibility.

During the trial of this case, Jacobson testified as to several reasons for Scott's termination. Initially, he testified that

[1] This conversation is based upon the credible testimony of Taliercio. I was impressed with Taliercio's demeanor. He testified in detail, both on direct and cross-examination. He was responsive and appeared sincere. Moreover, although Stapleton was called as a witness by Respondent, he was not questioned concerning this conversation. Thus, Taliercio's testimony is unrebutted.

[2] Although I do not conclude that Scott is as credible a witness as Taliercio, since his testimony is not denied or contradicted by Stapleton, and is consistent with that of Taliercio, I credit Scott's testimony.

[3] Stapleton, although called as a witness by Respondent, did not deny the interrogation attributed to him by Scott. Moreover, Scott's testimony is consistent with much of Respondent's admitted conduct.

[4] Scott impressed me generally as an evasive witness, especially on cross-examination, concerning the events surrounding his discharge. Moreover, looking at the destruction caused by his backing into the fence, it is impossible to believe that the driver of the truck would not only feel the impact, but hear it as well. The Key Food report of the accident indicating that Scott drove away without stopping to check the damage he had caused, indicates to me that Scott is an untrustworthy employee. Therefore, I find Scott to be generally an incredible witness. I credited his testimony concerning his conversations with Stapleton primarily because Stapleton did not deny them and because they were consistent with similar Respondent conduct (see fns. 1–3).

Scott was terminated for the reasons set forth in the termination letter as set forth and discussed above. Thereafter when reviewing Respondent's personnel file Jacobson testified that the April 30 accident, also discussed above, was a reason for his termination. Still later in his testimony, he testified that the juice incident was standing alone, sufficient to justify Scott's termination.

Sometime in the middle of May, Stapleton told Taliercio in the dispatcher's office not to wear the union T-shirts, because it was not their Union, and it was not good.

On May 14 or 18, Jacobson confronted Taliercio and stated to him: ''Listen you little fucking scum bag one wrong move and you're gone.'' Taliercio asked what he had done. Jacobson showed him a picture of his truck with a dent on the top and asked him if he had done this. Taliercio denied that he was responsible for the dent. Jacobson told Taliercio that he had already had three accidents since his employ, that he had stolen a large quantity of meat from his truck, and: '' One more spit on the fucking sidewalk and go see which union is going to protect you, because you'll be gone, you fucking faggot.''[5] At no time during this conversation did Jacobson tell Taliercio that he was terminated. Subsequently, Taliercio received a written warning which stated: ''This is not the first time trailer damage has happened in connection with your name. Should another such incident occur this company will terminate your employment. Thereafter, Taliercio had no further accidents nor work-related complaints.

On June 3, at Respondent's direction Respondent Attorney Pollack requested Local 6 to submit the question as to whether Respondent had the right to discharge Taliercio. Jacobson testified that about a week after his mid-May conversation with Taliercio, described above, he received two letters from Joseph Poza and John Stover, Respondent employees, which stated that they were given cards for Local 138 International Brotherhood of Teamsters, AFL–CIO and later for the Union and were asked to sign these cards by Taliercio who told them that if they didn't sign by May 14, they would lose their seniority and not be able to join the Union later (there was no specific union specified in their letters). Jacobson testified that he spoke with the above-named employees who confirmed that wrote the letters. Jacobson did not testify as to any specific conversation he may have had with these employees. Moreover, although Poza was called as a witness by Respondent, he was not questioned as to any conversation he had with Taliercio concerning the union cards nor a subsequent conversation with Jacobson concerning his letter. Stover was not called as a witness. Jacobson admits that solely on the basis of the contents of the letters he contacted his attorney, Pollack, and thereafter received a copy of Pollack's letter to Local 6 seeking to discharge Taliercio. Jacobson's actions were taken without speaking to Taliercio concerning the alleged union card solicitation.

[5] Jacobson admitted making the above statement attributed to him during his testimony, because at the time Taliercio was the Local 6 shop steward but was wearing a union T-shirt. Moreover, in his affidavit he also admitted making the same statement.

Conclusions

The Board's well-established test for determining whether recognition has been lawfully extended is twofold. At the time of recognition, an employer (1) must employ a substantial and representative compliment of its project work force, and (2) the employer must be engaged in its normal business operations. *Crown Cork & Seal Co.*, 182 NLRB 657 (1970); *Hayes Coal Co.*, 197 NLRB 1162 (1972); *Herman Bros.*, 264 NLRB 439 (1982); *Hilton Inn Albany*, 270 NLRB 1364 (1984); *A.M.A. Leasing*, 283 NLRB 1017 (1987). The Board had held that the finding that an employer was not engaged in its normal business operations at the time it extended recognition to a labor organization would, standing alone, establish a violation. *A.M.A. Leasing*, supra at 1024.

In *A.M.A. Leasing*, supra at 1023–1024, the Board affirmed the judge's finding that the employer therein unlawfully recognized the union on August 7 and entered into a collective-bargaining agreement with the union on August 15, because the employer did not begin its normal operations until September 17. The judge found that between the period of late July and mid-September, the employees hired were performing essentially cleanup and related work necessary in order to make the plant operational. It was only in mid-September, well after recognition had been granted, that the employer's plant became engaged in normal operations. See also *Hilton Inn Albany*, supra at 1365–1366.

In the instant case Respondent contends that its drivers were hired in December 1992, when they interviewed at the Marriot Hotel. Such contention is entirely without merit. The employees were not paid for the interview, were not placed on any payroll, and were not paid any regular salary until January 11. It is also clear that the employees were not hired on January 5 when they took their road test. At that time they were paid a flat rate for taking the test and informed that they were on a standby status until they were called to report to work. It was only on January 11, when Respondent took over the Key Food deliveries that the individuals who passed the road test were first called to report to work, filled out employment applications, were placed on Respondent's payroll, and were thereafter paid a regular salary that one could conclude that they first became employees in any real sense. It is undisputed that from January 5, when they took their road test, until January 11, when Respondent began its normal operations the alleged employees performed no work for Respondent and were not in any way paid. Thus, when Respondent extended recognition to Local 6 on January 5, it employed no employees, and was not engaged in its normal operations. As a matter of fact at the time recognition was extended, Respondent was not certain when its normal operation would begin. However, assuming Respondent's contention, that the employees were ''employees'' on January 5, the date recognition was extended, it is clear they performed zero work from January 5 until January 11. Thus, unlike the employees in *A.M.A. Leasing* and *Hilton Inn Albany*, where the employees performed cleanup work or work getting the plant operational, Respondent's so-called employees performed zero work during a like period. In any event the law is clear that merely listing employees on a payroll is not sufficient to rise to the level of engaging in normal operations; *A.M.A. Leasing* and *Hilton Inn Albany*.

Accordingly, I conclude that by executing a recognition agreement with Local 6 at a time when Respondent was not

engaged in its normal business operations, Respondent violated Section 8(a)(1) and (2) of the Act.

I also conclude that the execution of a collective-bargaining agreement with Local 6 on January 14, which flowed from the above unlawful recognition agreement is similarly unlawful, and in violation of Section 8(a)(1) and (2) of the Act. Moreover, since this collective-bargaining agreement also contains union-security and dues-checkoff provisions which were enforced, I conclude that Respondent additionally violated Section 8(a)(1) and (3) of the Act, *A.M.A. Leasing*, supra; *Hilton Inn Albany*, supra.

The Board has long held that it is unlawful to urge or threaten an employee with discharge in order to coerce him to join a union or to sign a dues-checkoff authorization. It is also unlawful to obtain a coerced dues-checkoff authorization card thereafter deduct and remit such deducted dues to a union, *Boggett Industrial Constructors*, 219 NLRB 171, 172 (1975); *Herman Bros*., supra.

The undisputed evidence establishes that Respondent's supervisor, Stapleton, solicited and directed Respondent's employees Taliercio and Scott to execute such dues-checkoff cards and pursuant to such cards, Respondent deducted dues from its employees' paychecks and remitted such dues to Local 6. By engaging in such conduct, I conclude that Respondent violated Section 8(a)(1), (2), and (3) of the Act, *Wackenhut Corp*., 226 NLRB 1085 (1976).

The evidence set forth above established that sometime in April or May, after Scott had attended a union meeting Respondent's supervisor, Stapleton, asked Scott whether there was a union meeting and who attended the meeting. Additionally, after attending a union meeting on May 7 Stapleton again asked Scott about the meeting, and what was going on, and what he was going to do about the Union. Stapleton was Respondent's operations manager, a high supervisory position. Scott was neither an open nor active union supporter, except for his attendance at these union meetings attended by other employees. The interrogations were accompanied by threats of discharged, described above and below. Accordingly, I conclude that such questions concerning whether there was a union meeting, which employees attended, and what was Scott's position as to the Union, in the circumstances described above, constitute unlawful interrogations, in violation of Section 8(a)(1) of the Act, *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Center*, 277 NLRB 1217 (1985).

The credible evidence clearly establishes that sometime in early May Respondent's supervisor, Stapleton, told employee Taliercio that according to Jacobson, the Union would never get in the shop, that Taliercio's efforts on behalf of the Union were wrong, and if he kept it up, he might not have a job. The credible evidence also establishes that following the May 7 union meeting, and in connection with above-described interrogation of Scott, Stapleton told Scott that if he continued his involvement with the Union, his job would be at stake. Such statements by Stapleton constitute clear threats to discharge employees because of their activities on behalf of the Union, and I conclude they are violative of Section 8(a)(1) of the Act; *Maremont Corp*., 294 NLRB 11, 40–41 (1989).

The facts establish that several days following Taliercio's heated conversation with Jacobson, and subsequent written warning concerning Taliercio's driver negligence, Jacobson received several alleged complaints from at least two drivers (Poza and Stover) concerning Taliercio's attempts to solicit their signing a card for the Union. Jacobson testified that Poza and Stover made written complaints concerning Taliercio's solicitations exhibits (R. Exhs. 5 a and b). The letters signed by both employees set forth that Taliercio asked then to sign a card for the Union and then stated; ''[I]f I didn't sign up by Friday, May 14, I would lose all my seniority and not be able to join the union later.'' Jacobson testified that he spoke with the above employees and verified the complaints. Following such verification he contacted his attorney, Pollack. Respondent contends that Taliercio's attempted solicitations constituted coercion and harassment of its employees. Solely, as a result of the above employee complaints, Respondent's attorney, Pollack, sent a letter to Local 6 requesting arbitration on whether Respondent had the right to discharge Taliercio (trial record pp. 331–334, G.C. Exh. 9). I find that Respondent, and its attorney's action, was taken solely because of the complaints filed by its employees, Poza and Stover.

Examining the employees' written complaints,[6] it is clear that the alleged coercion or harassment was caused by Taliercio's alleged statement that unless the employees signed a union card they would lose all their seniority and not be able to join the Union. I find such alleged threat to be amorphous, ambiguous, and virtually meaningless. For example, I am unable to determine what seniority was being referred to, or which Union the employees would not be able to join. The employees' complaints as a whole are directed to Taliercio's attempts to solicit the employees to sign a card on behalf of the Union. I find that Taliercio's actions, as set forth in the employees complaints constitute protected and concerted activity. Section 7 of the Act provides that employees have the right to solicit other employees to join a labor organization. The Board has held that only under extreme circumstances will union or concerted activity lose the Act's protection. Such circumstances include a public disparagement of an employer's product, a strike in breach of a collective-bargaining agreement, conduct that contravenes the basic policies of the Act, or violence, *YMCA of Pikes Peak Region*, 291 NLRB 998 (1988). I conclude that the alleged solicitations by Taliercio constitute activity protected by Section 7 of the Act.

The complaint alleges that Respondent's conduct in initiating arbitration proceedings seeking the discharge of Taliercio constitutes 8(a)(1) conduct. However, there is an 8(a)(3) aspect to this allegation in that such conduct constitutes the first step in a clear and unmistakable attempt to terminate Taliercio. The Board has held that where the sole reason for discharging an employee is his concerted activity, an analysis under *Wright Line*, 251 NLRB 1083 (1980), is not required; *Circle K Corp*., 305 NLRB 932, 934 (1991). Since I have concluded that the sole reason for seeking arbitration proceedings seeking the discharge of Taliercio is because he en-

[6] As set forth above, although Poza was called as a witness by Respondent he was not questioned about his written complaint concerning Taliercio's coercive solicitation. Stover was not called as a witness.

gaged in protected concerted activity, I find such activity unlawful and in violation of Section 8(a)(1) of the Act.[7]

It is alleged that Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee Scott. In determining whether Respondent violated the Act as alleged, General Counsel has the burden of proving that Scott's union activities were a motivating factor in Respondent's action. Once such factor is established, the burden shifts to Respondent to establish that the same action would have taken place in the absence of such union activity. *Wright Line*, supra; *NLRB v. Transportation Management Corp*., 462 U.S. 393, 398 (1983).

In the instant case, General Counsel has established that Scott attended several union meetings with other employees, that Respondent's supervisor, Stapleton, interrogated Scott and threatened him with discharge if he continued his activities on behalf of the Union. Scott was discharged several days following Respondent's interrogation and threat to discharge him. Thus the timing is suspicious. I conclude such evidence establishes that Scott's union activities were a motivating factor in his discharge.

The facts establish that Scott was terminated when he failed to report an accident he had while driving his truck. It wasn't the accident itself that precipitated the termination, but rather Scott's failure to report the accident, coupled with his denial of being aware of the accident when confronted with his failure to report it by Jacobson. Jacobson did not believe that Scott was unaware of the accident, neither did I. Scott and other employees, including Taliercio, had been involved in other accidents and were not disciplined by Respondent. I conclude that Scott was terminated based upon Respondent's accurate conviction that he was an untruthful and untrustworthy employee. The Board has upheld the discharges of principle union activists where it was found that the reason for their discharge was a betrayal of the employer's trust, *Arlington Hotel Co*., 278 NLRB 26 (1986); *Mission Valley Ford Truck Sales*, 295 NLRB 889 (1989).

General Counsel contends that Respondent offered shifting reasons for Scott's termination. In the letter notifying Scott of his termination, Respondent set forth as an additional reason for his termination Scott's subsequent failure to notify his dispatcher of a weekend return of 43 cases of perishable fruit juices so that the juices could be refrigerated. His failure to follow established procedure resulted in the spoilage of all cases. It appears clear to me, as explained by Jacobson during his testimony, that he could, and would have, discharged Scott for either one or both reasons, set forth in Scott's discharge letter and that moreover, upon being presented with Scott's personal file during the course of his testimony, he concluded that he could have also set forth another trailer accident that Scott had on April 30, prior to his failure to report the instant accident. I do not find such testimony to constitute shifting reasons for Scott's discharge, but rather, gratuitous additional reasons. In this regard, at the time Jacobson confronted Scott about his failure to report the trailer accident, he informed Scott that he was suspended immediately, and that he would in all probability be discharged. I conclude that it was Scott's failure to report an accident that he had to be aware of, that precipitated his discharge. I also conclude that Respondent has established that such discharge would have taken place in the absence of Scott's union activity.

[7] The complaint herein did not allege Respondent's conduct set forth and discussed as violative of Sec. 8(a)(3) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action to effectuate the policies of the Act.

I have concluded that Respondent violated Section 8(a)(1) of the Act by initiating arbitration proceedings seeking the discharge of Taliercio. The evidence established that Respondent's, Attorney Pollack, wrote a letter to Local 6 seeking such arbitration. the arbitration was never held because Taliercio subsequently filed a workman's compensation claim. Nevertheless, I conclude that the appropriate remedy in connection with this violation would be to require Respondent to withdraw such letter.

I have concluded that Respondent violated Section 8(a)(1), (2), and (3) by recognizing and thereafter entering into a collective-bargaining agreement with Local 6 and thereafter enforcing union-security and dues-checkoff provisions at a time when Local 6 did not represent an uncoerced majority of Respondent's employees. Therefore, I shall recommend that Respondent withdraw and withhold recognition from Local 6 and cease enforcing the terms of its collective-bargaining agreement with Local 6 and to reimburse its employees for all dues collected and remitted to Local 6 with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and Local 6 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (2) of the Act, by recognizing and bargaining with Local 6 as the exclusive collective-bargaining representative of its drivers at Respondent's Brooklyn facility at a time when Local 6 did not represent an uncoerced majority of Respondent's employees.

4. Respondent violated Section 8(a)(1), (3), and (5) of the Act by enforcing and maintaining a collective-bargaining agreement with Local 6 containing a union-security clause and a check-off provision at a time when Local 6 did not represent an uncoerced majority of Respondent's employees.

5. Respondent violated Section 8(a)(1) and (2) of the Act by soliciting its employees covered by the Local 6 collective-bargaining agreement, described above, to execute Local 6 membership and dues-checkoff cards.

6. Respondent violated Section 8(a)(1) and (3) of the Act by threatening the employees covered by the Local 6 collective-bargaining agreement, described above, with discharge if they did not sign Local 6 membership and dues-checkoff cards.

7. Respondent violated Section 8(a)(1) of the Act by interrogating its employees concerning their membership in or activities on behalf of the Union.

8. Respondent violated Section 8(a)(1) of the Act by threatening its employees with discharge because of their membership in or their activities on behalf of the Union.

9. Respondent violated Section 8(a)(1) of the Act by initiating arbitration proceedings seeking the discharge of its employee, Vincent Taliercio, because of his membership in or activities on behalf of the Union.

[Recommended Order omitted from publication.]